

2007

Ching-Ping Liao v. Evergreen Products, Inc., Frederick P. Ninow, Frederick G. Ninow, Beth Quintana : Brief of Appellee

Utah Court of Appeals

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Beth Quintana; Appellee Pro Se.

Donald L. Dalton; Dalton and Kelley; Attorneys for Appellant.

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IN THE UTAH COURT OF APPEALS

CHING-PING LIAO,

Plaintiff/Appellant,

Vs.

EVERGREEN PRODUCTS, INC.,
FREDERICK P. NINOW,
FREDERICK G. NINOW,
BETH QUINTANA,

Defendant/Appellee.

Case No. 20070934-CA

APPELLEE'S OPENING BRIEF

From Amended Order Granting Defendant Beth Quintana's
Motion to Dismiss
Entered October 23, 2007 by the Third Judicial District Court
Salt Lake County, Honorable Robert P. Faust, Presiding

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FILED
UTAH APPELLATE COURTS
JUN 17 2008



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JURISDICTIONAL STATEMENT

This court has jurisdiction under UCA s 78A-4-103(2)(j).

STATEMENT OF ISSUES / STANDARD OF REVIEW

1. Whether the trial court abused its discretion in dismissing the action under URCP 41(b).
2. Whether the trial court erred in concluding that the action against Defendant Beth Quintana was barred by the statute of limitations.

STATEMENT OF THE CASE

Plaintiff did file an action against Defendant Evergreen Products, Inc., a Utah corporation, on December 17, 2001 (R. 1). Evergreen Products, Inc., was a corporation which was involuntarily dissolved in 1996 after Defendant Beth Quintana was in a serious accident and unable to continue working.

Plaintiff did serve Defendant Frederick P. Ninow (May 5, 2002). He was named erroneously because the first in the series of payments (R, 17) were issued to “Fred Ninow.” Motion to Dismiss Claims Against Frederick P. Ninow (R. 15), and the trial court granted the Motion in a Minute Entry entered June 11, 2002 (R. 26).

Plaintiff did serve Defendant Frederick G. Ninow May 15, 2004 (R.28). A Motion to Dismiss Claims Against Frederick G. Ninow (R. 42) was filed. An Order Denying Motion to Dismiss Claims Against Frederick G. Ninow (R. 73) . On March 22, 2005, Plaintiff served a Discovery Plan and Case Management Order. Defendant Frederick G. Ninow’s response was a Request for Extension of Time to Respond to Discovery Plan (R.77). Defendant Frederick G. Ninow then filed a Request for Extension of one month, to May 9, 2005, to obtain an attorney (R. 77). On April 19, an Order Granting

Extension of Time (R. 79) was granted. A second Request for Extension of Time (R. 84) was requested due to health issues. It was not granted.

Plaintiff then served a Request for Entry of Case Management Order (R.86) which was not served or received by Defendant Frederick G. Ninow and therefore there was no attempt to reply. As a result, Plaintiff filed a Motion for Sanctions (R. 91) which also was not served or received by Defendant Frederick G. Ninow so no attempt was made to reply. The Motion for Sanctions was granted March 16, 2006 (R. 98) and a Motion for Entry of Default Judgment (R. 100). Default Judgment was entered August 8, 2006 (R. 108) of which Defendant Frederick G. Ninow was not aware of.

On October 6, 2006 Defendant Frederick G. Ninow passed away after a brave fight (over eighteen (18) months) with a long and painful illness, including several heart attacks and many strokes, that left him bedridden for several months and in the care of Hospice until his death.

On October 10, 2006 (R. 110) Defendant Beth Quintana was served at the Church while attending her father Frederick G. Ninow's Funeral.

In December 1990, Defendant Frederick G. Ninow and his wife met and befriended the Liao family in South Africa. It was Mrs. Edith Liao's desire to send her children (Carol) CHI-PING LIAO and her brother (Regis) CHING-PING LIAO to the United States to become students. Carol CHI-PING LIAO

arrived first and was introduced to and accepted as part of the Ninow Family who helped her find her apartment, get her drivers license, register her in school and many other things that she needed. . She soon made her intentions clear that she wanted to change her Visa from a student to a permanent resident status. She (Carol Chi-Ping Liao) investigated all the laws and consulted an attorney who told her that if she invested capital in a company with American employees that she could get her status changed. (Carol) CHI-PING LIAO approached Defendant Frederick G. Ninow to help her, he in turn asked Defendant Beth Quintana his daughter to accept her investment and make her a Share Holder. After much persuasion from both (Carol) CHI-PING LIAO and Defendant Frederick G. Ninow Defendant Beth Quintana accepted (Carol) CHI-PING as an investor. On March 22, 1996 the first of a series of checks was received by EVERGREEN PRODUCTS, INC. as stated in the Share Purchase Agreement the checks would be issued as needed by the company. Because of this agreement the shares for the Corporation were not to be issued until paid in full. (Carol) CHI-PING LIAO purchased 35,000 shares at (one dollar) \$1.00 per share. At this time EVERGREEN PRODUCTS, INC only had 50,000 Shares. (Carol) CHI-PING LIAO had controlling interest in EVERGREEN PRODUCTS, INC. and worked side by side with Defendant Beth

Quintana on a daily basis and in making all the decisions.

In October 1996 Defendant Beth Quintana was in an almost fatal accident and was under doctors care and in physical therapy for many months and unable to continue with the work. Defendant Beth Quintana offered to (Carol) CHI-PING LIAO to take over and keep the entire Company which she refused. "She did not want to have to keep working, and only wanted finished product.". It was even suggested that she could have them made in China.

Defendant Beth Quintana had no option but to let EVERGREEN PRODUCTS, INC. go into default.

Defendant Beth Quintana and (Carol) CHI-PING LIAO continued to be friends, watching movies, visiting her family, attending family and church functions, attending the same church and associating with the same friends. Defendant Beth Quintana not only lived at the same Apartment Complex but was the Manager of the Apartment Complex that (Carol) CHI-PING LIAO and later her brother (Regis) CHING-PING LIAO lived in. When Defendant Beth Quintana transferred to a new project for the owners of the Apartment Complex she still remained a resident in the same complex and continued her association with (Carol) CHI-PING LAIO. Because of their mutual friends, associates and church (Carol) CHI-PING LAIO has always had the ability to

know where Defendant Beth Quintana was even after she moved.

When (Regis) CHING-PING LAIO (younger than (Carol) CHI-PING LAIO) arrived in the United States he wanted an accounting of the family money and when he found out that (Carol) CHI-PING LAIO had mismanaged it he was angry (even though her mother Edith Laio had given her permission to use some of the money for EVERGREEN PRODUCTS, INC.). (Carol) CHI-PING LAIO went to great lengths and risks to try and become a permanent resident but it was not until (Regis) CHING-PING LAIO served Defendant Frederick P. Ninow did we realize the extent of his anger. It came as a shock to the Ninow Family and to Defendant Frederick G. Ninow and Defendant Beth Quintana who had not only befriended but helped both of them. (Carol) CHI-PING LAIO and her brother (Regis) CHING-PING LAIO knew the Ninow family intimately and knew that Defendant Frederick P. Ninow had no involvement in EVERGREEN PRODUCTS, INC. but they did know that he had a money and it was not until the case was dismissed against Defendant Frederick P. Ninow that they pursued Defendant Frederick G. Ninow and when he passed away and only when he passed away did they pursue Defendant Beth Quintana stating that they wanted an accounting of Defendant Frederick G. Ninow's Estate presuming that he had money and that Defendant Beth Quintana would inherit from the Estate.

STATEMENT OF FACTS

Facts relevant to the issues presented for review have been stated in the foregoing Statement of the Case.

SUMMARY OF ARGUMENTS

1. The trial court's decision was not based on an erroneous interpretation of URCP4(b). The plaintiff's efforts to serve Defendant Beth Quintana and prosecute the action against the other Defendants were not credible as stated in the foregoing Statement of the Case. Furthermore it was not the Defendant Beth Quintana's responsibility or duty to do the work of the Plaintiff's process servers as stated in the foregoing Statement of the Case. The Plaintiff and / or his sister knew exactly where and how to find Defendant Beth Quintana (even today through mutual friends and acquaintances). The trial court did not abuse its discretion in dismissing under URCP 41(b).

2. Plaintiff's attorney's have failed to show that Plaintiff CHING-PING LAIO has the authority to act in behalf of his sister CHI-PING LAIO and yet Plaintiff's Attorney's continue to refer to CHING-PING LAIO as representing "her" and "she", interchanging their identities throughout this whole process

even after we the Defendants brought this to the Plaintiff's Attorney's attention. If indeed Defendant Beth Quintana is being sued by CHING-PING LAIO what part does CHI-PING LAIO who had controlling interest in EVERGREEN PRODUCTS INC. have since according to the Plaintiff's Opening Brief and all other documentation provided CHING-PING LAIO is not CHI-PING LAIO.

ARGUMENTS

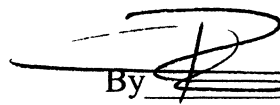
1. THE TRIAL COURT'S DECISION WAS CORRECT AND NOT AN ERRONEOUS INTERPRETATION OF URCP 4(b).

CONCLUSION

For the foregoing reasons, the trial court's Minute Entry (R.275) and Order Granting Defendant Beth Quintana's Motion to Dismiss (R. 309) should not be VACATED and REVERSED.

DATED this 16 day of June, 2008.

BETH QUINTANA,

By 
Beth Quintana
PRO SE

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

CHING-PING LIAO,	:	MINUTE ENTRY
Plaintiff,	:	CASE NO. 010911458
vs.	:	
EVERGREEN PRODUCTS, INC.,	:	
FREDERICK P. NINOW, FREDERICK G.	:	
NINOW, BETH QUINTANA, DOES I-XX,	:	
Defendants.	:	

The Court has before it a request for decision filed by the Plaintiff seeking a ruling on his Motion for Leave to Amend and Enlargement of Time to Serve Summons and Defendant Beth Quintana's Motion to Dismiss. The Court notes that the Plaintiff has requested oral argument on the Motions. While the Motion to Dismiss is dispositive, the Court determines that a hearing on this Motion is not necessary and would not assist the Court because the issues have been clearly articulated by the parties in their written submissions.

Specifically, while this matter has a convoluted procedural history, the fact remains that the Complaint against the Defendants, including Defendant Quintana, was filed in 2001 and she was not served until late 2006. The Court determines that the Plaintiff's failure to serve Defendant Quintana within the 120-day time period set forth in Rule 4(b) of the Utah Rules of Civil Procedure or to otherwise prosecute this

action against her for over five years is inexcusable. Indeed, the Plaintiff's assertions that he could not locate Defendant Quintana during this time period are simply not credible, particularly since these parties attended the same church and lived in the same apartment complex. Moreover, if Defendant Quintana's whereabouts were indeed unknown to the Plaintiff, then he should have sought to serve her by alternative means. The fact that the Plaintiff did not do so underscores his failure to diligently prosecute this action.

In addition to the Plaintiff's failure to timely serve and to diligently prosecute his claims, which alone provide sufficient grounds to dismiss this action, the Court also determines that the Plaintiff's claims are barred by the statute of limitations. Under these circumstances, an amendment of the Plaintiff's Complaint would be futile. Accordingly, the Court determines that Defendant Quintana's Motion to Dismiss is well-taken and therefore granted. The Plaintiff's Motion for Leave to Amend and Enlargement of Time to Serve Summons is denied.

Counsel for Defendant Quintana is to prepare an Order consistent with this Minute Entry decision and on the detailed grounds for dismissal (including specific citation to the applicable statute of limitations)

discussed in its supporting and reply Memoranda. Counsel is to submit the Order to the Court for review and signature.

Dated this 30 day of August, 2007.

15

ROBERT P. FAUST
DISTRICT COURT JUDGE

ERIK A. CHRISTIANSEN (7372)
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FILED DISTRICT COURT
Third Judicial District

OCT 23 2007

By RG SALT LAKE COUNTY
Deputy Clerk

**IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH**

CHING-PING LIAO,

Plaintiff,

vs.

EVERGREEN PRODUCTS, INC.,
FREDERICK P. NINOW, FREDERICK G.
NINOW, BETH QUINTANA, DOES I-XX,

Defendants.

**AMENDED [PROPOSED] ORDER
GRANTING DEFENDANT BETH
QUINTANA'S MOTION TO DISMISS**

Case No. 010911458

Judge: Hon. Robert P. Faust

Oral Argument Requested

This matter came before the Court pursuant to Defendant Beth Quintana's ("Defendant") Motion to Dismiss and Plaintiff Ching-Ping Liao's ("Plaintiff" or "Ching-Ping") Motion for Leave to Amend and Enlargement of Time to Serve Summons ("Motion to Amend"). On September 6, 2007, the Court issued its Minute Entry Decision ("Decision"). In its Decision, the Court GRANTED Defendant's Motion to Dismiss with prejudice and DENIED Plaintiff's Motion to Amend.

Thus, based on all pleadings and admissible evidence submitted to the Court, it is hereby ORDERED, ADJUDGED, and DECREED as follows:

1. The Complaint against Defendant Beth Quintana was filed in 2001. Ms. Quintana, however, was not served until late 2006. Plaintiff's failure to serve Defendant within the 120-day time period set forth in Rule 4(b) of the Utah Rules of Civil Procedure or to otherwise prosecute this action against her for over five years constitutes inexcusable delay, especially considering that the parties lived in the same apartment complex and attended the same church. The fact the Plaintiff failed to serve Defendant by one of the alternative means available Pursuant to Rule 4 of the Utah Rules of Civil Procedure further evidences Plaintiff's failure to diligently prosecute this action.

2. Because Plaintiff has failed to provide any persuasive or legally excusable reason why he has failed to take steps to move his claims against Defendant forward in the five years since the Complaint was filed, such claims are dismissed pursuant to Rule 41(b) of the Utah Rules of Civil Procedure for lack of prosecution.

3. In addition to Plaintiff's failure to timely serve and diligently prosecute his claim, the Court also finds that Plaintiff's claims are barred by the statute of limitations found in Utah Code. Ann. §§ 78-12-23, 78-12-25, 78-12-27, and/or 78-12-40.


4. Accordingly, under these circumstances an amendment of Plaintiff's Complaint would be futile and the Court hereby dismisses Plaintiff's Complaint with prejudice.

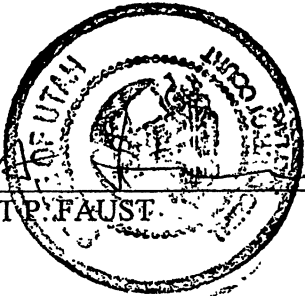
ORDER

1. Defendant Beth Quintana's Motion to Dismiss is GRANTED and Plaintiff's Complaint is DISMISSED with prejudice; and

2. Plaintiff's Motion for Leave to Amend and Enlargement of Time to Serve Summons is DENIED.

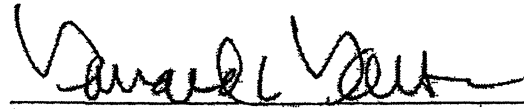
DATED this 23 day of October, 2007.


JUDGE ROBERT P. FAUST



APPROVED AS TO FORM:

Date: October 17, 2007

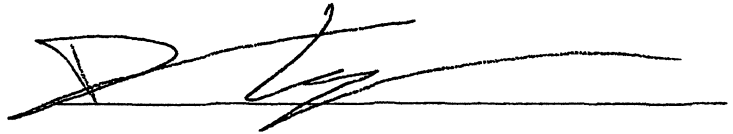
A handwritten signature in black ink, appearing to read "Donald L. Dalton", written over a horizontal line.

Donald L. Dalton
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of October, 2007, I caused to be served by United States mail, first-class postage prepaid, a true and correct copy of the foregoing AMENDED [PROPOSED] ORDER GRANTING DEFENDANT BETH QUINTANA'S MOTION TO DISMISS, to:

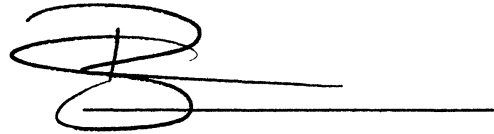
Donald L. Dalton
DALTON & KELLEY
P.O. Box 58084
Salt Lake City, UT 84158

A handwritten signature in black ink, appearing to be 'D L Dalton', written over a horizontal line.

CERTIFICATE OF SERVICE

THIS WILL CERTIFY that true and correct copies of the within and foregoing "Appellee's Opening Brief" were mailed, First Class, postage prepaid, this) 16 day of June, 2008, to:

Donald L. Dalton (4305)
DALTON 7 KELLEY, PLC
Post Office Box 58084
Salt Lake City, UT 84158

A handwritten signature in black ink, appearing to be "D. Dalton", written over a horizontal line.